Supreme Court, U.S.
FILED

03 226 JUN 9 - 2003

No. _____

UNITED STATES SUPREME COURT
Term: October, 2002

JOHN R. WHALEN **PETITIONER**

v.

COMMONWEALTH OF KENTUCKY **RESPONDENT**

On Petition for Writ of Certiorari to the United States Supreme Court

---

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

ED W. TRANTER
33 North Ft. Thomas Ave.
Ft. Thomas, KY 41075
(859) 781-5700

COUNSEL OF RECORD FOR PETITIONER, JOHN R. WHALEN

HIPP

QUESTIONS PRESENTED FOR REVIEW

1. Whether the particularity requirement has been met when a warrant was issued using broad and general terms to describe what police were looking for when they had enough information to describe with particularity the items they wished to seize but failed to do so.

2. Whether all evidence seized by police should be suppressed due to the fact they seized hundreds of items that did not even fit the description of "video tapes" and "video recording equipment."

3. Whether the Trial Court's severance ruling that certain items seized might be inadmissible cures the violations of the United States Constitution.

LIST OF ALL PARTIES TO THE PROCEEDINGS

Petitioner/Appellant/Defendant – John R. Whalen

Respondent/Appellee/Plaintiff - Commonwealth of Kentucky

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i

LIST OF ALL PARTIES TO THE PROCEEDING.....ii

TABLE OF CONTENTS.....iii-iv

INDEX TO APPENDICES.....v

TABLE OF AUTHORITIES CITED.....vi-vii

OPINIONS BELOW.....2

JURISDICTION.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE.....3-7

REASONS FOR GRANTING THE WRIT:

1. The search warrant did not meet the particularity requirement of the United States Constitution.....7-8

2. The police seized hundreds of items that did not even fit the general description of "video tapes" and "video recording equipment," requiring suppression of all of the evidence seized 9-10

3. The Trial Court's severance ruling that certain items seized might be inadmissible does not cure the violations of the United States Constitution.....10

CONCLUSION.....11

INDEX TO APPENDICES

APPENDIX A	Kentucky Supreme Court Decision
APPENDIX B	Kentucky Court of Appeals Decision
APPENDIX C	Application and Affidavit for Search Warrant 10/20/00
APPENDIX D	Search Warrant 10/20/00
APPENDIX E	Inventory of Items Seized at Search of 10/20/00

TABLE OF AUTHORITIES CITED

CASES: PAGE:

UNITED STATES SUPREME COURT

United States v. Leon, 468 U.S. 897; 104 S.Ct. 3405; 82 L.Ed. 2d. 677.....8

Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979).....9, 10

Marron v. United States, 275 U.S. 192, 196 (1927).....8

Stanford v. State of Texas, 379 U.S. 476 (1965).....7

Steele v. United States, 267 U.S. 495 (1925).....8

Ybarra v. Illinois, 444 U.S. 85, 92, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979).....7

UNITED STATES COURT OF APPEALS

United States v. Cardwell, 680 F.2d 75 (9th Cir. 1982).....10

Florida v. Johnson, 605 So. 2d 545 (1992).....9, 10

STATUTES

28 U.S.C. § 1257 (a).....2

UNITED STATES CONSTITUTION

U.S Constitution Amendment IV.....2, 7

No. _____

UNITED STATES SUPREME COURT

Term: October, 2002

JOHN R. WHALEN **PETITIONER**

v.

COMMONWEALTH OF KENTUCKY **RESPONDENT**

On Petition For Writ of Certiorari to the United States Supreme Court

---

PETITION FOR WRIT OF CERTIORARI

Comes now the Petitioner, John R. Whalen, by counsel, and respectfully requests that a Writ of Certiorari issue to review the denial of certiorari by the Supreme Court of Kentucky (2002 SC-0339-D) filed on 3/12/03 and the Opinion of the Commonwealth of Kentucky Court of Appeals (2001-CA-000684-MR) filed on 3/22/02. In its Opinion, the Kentucky Court of Appeals determined that the seizure of some of the items from the Petitioner's home may have exceeded the scope of the warrant but it did not amount to a flagrant disregard of the warrant therefore not converting the search to a general one. As a result, the Kentucky Court of Appeals (2001-CA-000684-MR) affirmed the Judgment of the trial court (00-CR-674), Kenton Circuit Court, of 3/28/01.

This is a motion for certiorari asking the Court to review a search and seizure of the Petitioner's home based on the particularity requirement of the 4th Amendment.

OPINIONS BELOW

In February 2001 the Kenton Circuit Court entered Judgment (00-CR-674) after accepting the Petitioner's conditional guilty plea and he was convicted for the Use of a Minor (under 16 years old) in a Sexual Performance. At sentencing, the Petitioner was sentenced to twelve (12) years in the State Penitentiary. On appeal, the Commonwealth of Kentucky Court of Appeals (2001-CA-000684-MR) affirmed the judgment of the Circuit Court on the Petitioner's motion to suppress the fruits of the search of his home pursuant to a search warrant. The Supreme Court of Kentucky denied certiorari (2002-SC-0339-D).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Cons. Amend IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On October 20, 2000 Detective Ron Johnson of the Ft. Mitchell Police Department signed an Application and Affidavit in support of a search warrant to search the home of Movant, John R. Whalen, at 60 Superior Drive, Ft. Mitchell, Kentucky, requesting that he be able to search those premises for "**video tapes and video recording equipment**." (APPENDIX D)

In Detective Johnson's Affidavit (APPENDIX C) was contained a hearsay statement that movant's son, Christopher Whalen, had advised Detective Johnson that he viewed a videotape showing the Movant, John R. Whalen, and a male, white minor, nude on a couch masturbating each other. That videotape is the basis for the indictment for violation of K.R.S. 531.310, use of a minor in a sexual performance.

On presenting the Affidavit in support of the search warrant Judge Martin Sheehan on October 20, 2000, the Judge signed the search warrant that was actually drafted and prepared by the Commonwealth and brought to the Judge for signing. It commanded any policeman, sheriff, constable, or other police officer of the Commonwealth of Kentucky to search the premises at 60 Superior Drive, Ft. Mitchell, Kentucky, for the following property:

Video tapes and video recording equipment (APPENDIX D)

Although the Affidavit (APPENDIX C) in support of the search warrant did indicate that there was a specific videotape that caused the request for the search warrant, the warrant itself, as drafted by the prosecution, did not specify any particular video tapes. And the search warrant did not reference, nor incorporate the application and affidavit as further describing the videotapes to be seized.

With the warrant in hand, Det. Ron Johnson and Sgt. Tom Loos, accompanied by Officers Bussman and Taylor, went to the Whalen home on October 20, 2000 to search for

and seize video tapes and video recording equipment. The Movant, upon presentation of the warrant, suggested to Det. Johnson that he though he knew what he was looking for, that being tapes of various sex acts that were kept in Mr. Whalen's foot locker in the basement behind the bar, which required a key to unlock, and then a knife to actually open.

Upon opening the locked box with a key and then prying it open with a knife, Det. Johnson discovered a great many videotapes, along with audiotapes and magazines and other items that were not tapes. The inventory indicates that there were 159 items in that box that were seized, and the contents were listed and numbered as 1 through 159.

The warrant did not name the specific videotape that was mentioned in the Affidavit in support of the search warrant and that videotape was not among approximately fourteen (14) videotapes seized from the locked box (APPENDIX E). But the police testified that they were looking for that tape and any that **in their discretion** were explicitly adult videos, and did not take those that were not adult, videos, only those the police believed to be in the scope of the investigation according to their judgment.

While Det. Johnson was going through tapes downstairs to decide which were explicitly adult videos to be seized, Sgt. Loos was upstairs looking for that specific videotape which is the basis of the charge against John R. Whalen. Sgt. Loos testified that while upstairs he viewed videotapes that he found in parts of the home he searched, including commercial movie tapes and family videos and that he **used his discretion** to **decide which of the videotapes were applicable to his investigation** and took only those. Det. Johnson also testified that he **used his discretion** in determining **what videotapes at the Whalen home to seize**. And of course, the warrant merely recited any peace officer was commanded to search for "**video tapes and video recording equipment**."

After Sgt. Loos was unable to locate the video that he was looking for and described to Det. Johnson by Christopher Whalen, Sgt. Loos began questioning Mr. Whalen about the whereabouts of that specific videotape that was reported to have been in a camera in the Whalen home on October 19, 2000. According to the report of the officer, Mr. Whalen questioned what that camera was important, and Sgt. Loos explained that the camera and the video it contained were "specifically" named in the search warrant, which was not true. Sgt. Loos, in his testimony, continued to maintain that where the warrant commanded seizure of "video tapes and video recording equipment" that that constituted a specifically named camera and the video it contained. Sgt. Loos was so certain about the specific videotape that he was there to seize; that he explained to Mr. Whalen that he "believed the videotape contained a recording of him and a teenager masturbating each other." After Sgt. Loos advised of the specific video tape that he was looking for, Mr. Whalen then asked if the fact that the teenager consented would make a difference, to which Sgt. Loos replied that there were "several factors that had to be considered when deciding how significant the recording would be." In his testimony on January 29, 2001, Sgt. Loos was asked about the "several factors" that would have to be considered in deciding the significance of the recording and basically was only able to say that the age of the teenager was a factor. He further acknowledged that he was aware of the Affidavit filed on behalf of the Commonwealth by Det. Johnson stating that the person in the video was a minor and appeared approximately 14 years old; and of course, if the person had not been a minor, the officers would not have been there with the search warrant to begin with.

After discussion about the "several factors," and the Movant being told that the police would continue to search until every place that could contain the video camera would be searched, Mr. Whalen then showed the officers where the camera and videotape were located.

The police then left the Whalen home with all of the tapes, magazines and other items listed in the inventory. (APPENDIX E)

After the Movant was Indicted on or about December 15, 2000 and the Movant filed his motion to suppress the use of the search of October 20, 2000 on January 8, 2001. An evidentiary hearing was held on the motion to suppress on January 29, 2001, and the Court entered an Order on February 13, 2001 denying the motion to suppress as it related to other items seized (00-CR-674) stating in that opinion,

> IT IS HEREBY ORDERED AND ADJUDGED that the defendant's motion to suppress, as it relates to the videos and video camera, is DENIED.
>
> FURTHER, the defendant's motion to suppress, as it relates to all other items seized, is TAKE UNDER SUBMISSION. If the Commonwealth seeks to admit any of these items in evidence, it shall promptly notify counsel for the defendant, and this issue will be reconsidered by the court upon request of the defendant.

Thereafter, on February 19, 2001, the Movant filed a motion to be re-arraigned and tendered a conditional guilty plea on February 22, 2001. The Court entered a final judgment and sentence of imprisonment on March 28, 2001, sentencing the Movant to twelve (12) years in a state penitentiary (00-CR-674).

Consistent with the guilty plea, the Movant then filed a Notice of Appeal on March 29, 2001.

The Court of Appeals issued its Opinion on March 22, 2002 affirming the Trial Court's ruling on the search (2001-CA-000684-MR). As to the issue of the search warrant not

particularly describing the videotape that the police officers were searching for and seized, the Court of Appeals stated, "both officers were aware of the facts establishing probable cause and understood the object of their search accordingly.... [and] the officers had found the very tape and camera they wanted." The very tape that the officers wanted was not described with any particularity in the search warrant, and thus, it was left for the officers to exercise their discretion in deciding which tapes they wanted.

REASONS FOR GRANTING WRIT

I. The search warrant did not meet the particularity requirement of the United States Constitution.

The Fourth Amendment to the United States Constitution provides in part: **that no search warrant shall issue, but upon probable cause,... and particularly describing the place to be searched and the ... things to be seized.**

In the set of facts at issue here the warrant was as general as one could imagine. The warrant (APPENDIX D) merely provided for seizure of: videotapes and video recording equipment. The requirement of particularity is not a mere "technicality," it is an express constitutional command. *Ybarra v. Illinois*, 444 U.S. 85, 92, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979). It is because the requirement of particularity was not found in the warrant at issue here that the video should not be allowed in against the Appellant. The Court has found in the past that warrants that were more specific than the one at issue here were not specific enough to pass Constitutional muster. The Court has found that a warrant ordering officers to search for "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning state Communist Party and its operations" fell into the category of

a general warrant and violated the constitutional requirement that warrants shall particularly describe the things that are to be seized. *Stanford v. State of Texas*, 379 U.S. 476 (1965).

The warrant at issue here ordering officers to search for "video tapes and video recording equipment" is less specific than the one from *Stanford*. In our set of facts there were no guidelines for law enforcement officers to follow and what resulted was a general search warrant to be executed solely at their discretion. There were no descriptions, although they had one, and nothing to guide the officer's search once they were inside the house. "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 196 (1927). Here, the officers admitted to seizing items at their discretion thus explicitly violating the Appellant's constitutional rights and calling for the items unlawfully seized to be suppressed.

A search warrant according to the United States of America and the State of Kentucky requires, in order to comply with their respective Constitutions, a description with as much particularity as reasonable under the circumstances the things to be seized. *Steele v. United States*, 267 U.S. 495 (1925), *United States v. Leon*, 468 U.S. 897; 104 S.Ct. 3405; 82 L.Ed. 2d 677.

In our case, the warrant, which was drafted by the police for the Judge's signature could have been drafted to describe the videotape that was alleged to show the commission of the crime of sexual performance with a minor. The Appellant's son, Christopher Whalen, had provided the specific information that could have described the videotape. The police had this report when filling out the warrant but failed to use it to specifically describe the video. With the extremely vague command to seize "video tapes" the police decided to seize all videotapes which they, at their discretion,

believed to be in the scope of their investigation. However, the warrant did not describe the video that Christopher Whalen told of, and it did not incorporate the Affidavit to reference what specifically should be seized.

II. The police seized hundreds of items that did not even fit the general description of "video tapes" and "video recording equipment," requiring suppression of all of the evidence seized.

The warrant although unconstitutionally vague, did restrict the seizure to videotapes and video recording equipment, but even that was ignored during the search. The police, under this warrant went into the Appellant's home and perused through the home seizing **at their discretion** things that were not even remotely close to "video tapes" or "video recording equipment."

Where a warrant authorizes police to seize specific pornographic video tapes and the officers exceed that authority by seizing all videotapes they feel obscene, the Court found that the Fourth Amendment was violated and thus suppressed all of the videotapes that were a result of law enforcement officials general exploratory rummaging in a person's belongings. *Florida v. Johnson*, 605 So. 2d 545 (1992). The Court went on to state that where law enforcement grossly exceeds the scope of the search warrant in seizing property, the particularity requirement is undermined and a valid warrant is transformed into a general warrant, thereby requiring suppression of all evidence seized under the warrant, citing, *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979). The Fourth Amendment requirement "that things to be seized be particularly described is to prevent a general, exploratory rummaging in a person's belongings. This is accomplished by removing from the officer executing the warrant all discretion as to what is to be seized. The

particularity requirement is even more stringent with things to be seized have the presumptive protection of the First Amendment."

In our case, the search even more grossly exceeded the lawful scope. After failing to describe with particularity what was to be seized, the search was not even conducted within the general scope of videotapes and video recording equipment. Instead, hundreds of magazines and other items were seized based on the policemen's judgment as to what he could find in the Appellant's home that he believed to be sexually explicit adult videos.

III. The Trial Court's severance ruling that certain items seized might be inadmissible does not cure the violations of the United States and Kentucky Constitutions.

The Trial Court, in ruling on Appellant's motion to suppress the fruits of the search of October 20, 2000, ruled that the "videos and video cameras" were admissible but that the Court would take under submission the motion relative to the other items, and rule only after the Commonwealth advised whether it would seek to admit those items into evidence, and the Defendant would then be required to again request a ruling.

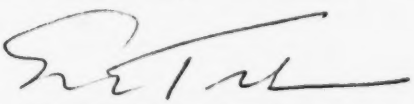
Severance is not a remedy in this case. First of all, the warrant was not nearly particular enough in its description of what tape or tapes should be seized, and therefore, none of the tapes or tape equipment could be used as evidence. (See list of cases cited in Arguments I and II). In addition, as indicated in *Florida v. Johnson*, and *Lo-Ji Sales, Inc. v. New York*, above, where a warrant is transformed by law enforcement officers into a general warrant to seize all that the officers determine in their discretion, to violate the law, all of the evidence seized under the warrant must be suppressed. This proposition has also been advanced in *United States v. Cardwell*, 680 F.2d 75 (9th Cir. 1982), where

it said that identifiable portions of a warrant must be sufficiently specific and particular to support a severance. None of the items seized were seized in conformity with the particularity requirement.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should be issued to review the Opinion of the Commonwealth of Kentucky Court of Appeals rendered on March 22, 2002 (2001-CA-000684-MR).

Respectfully submitted,



ED W. TRANTER
33 North Ft. Thomas Ave.
Ft. Thomas, KY 41075
(859) 781-5700

Counsel for Petitioner,
John R. Whalen

APPENDIX "A"

SUPREME COURT OF KENTUCKY

2002-SC-0339-D
(2001-CA-0684-MR)

JOHN R. WHALEN MOVANT

KENTON CIRCUIT COURT
v. 2000-CR-0674

COMMONWEALTH OF KENTUCKY RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED: MARCH 12, 2003.

S/_____
CHIEF JUSTICE

APPENDIX "B"

RENDERED: MARCH 12, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

No. 2001-CA-000684-MR

JOHN R. WHALEN APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 00-CR-00674

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE: In October, 2000, four officers of the Fort Mitchell Police Department in Kenton County executed a search warrant at the residence of John Whalen. They seized numerous items including an 8mm video tape allegedly depicting Whalen and a fourteen-year-old boy engaged in sexual activity. Soon thereafter the grand jury indicted Whalen for the offense of using a minor in a sexual performance.[1] Whalen moved to suppress all the evidence taken from his residence--including the 8mm video tape and Commonwealth intended to introduce--but that motion failed,

[1] KRS 531.310, in this case a class B felony.

and he thereupon plead guilty, reserving the right to appeal the suppression issue. By judgment entered March 28, 2001, the Kenton Circuit Court sentenced him to twelve years in prison. This appeal then followed. Whalen contends that the search warrant for his residence failed to specify the objects of the search with the particularity required by both the federal and Kentucky constitutions and that the executing officers extended their search beyond even the excessive terms of the warrant. We are convinced, however, that the warrant was valid and its execution essentially lawful. To the extent, if any, that items were seized beyond the scope of the warrant, the proper remedy in this case, as the trial court ruled, was not to suppress all of the seized items, but only those in excess of the warrant. Accordingly, we affirm.

The warrant at issue was signed and executed on October 20, 2000. It authorized a search of Whalen's Fort Mitchell residence for '[v]ideo tapes and video recording equipment." It was based on the affidavit of the investigating detective, who averred that Whalen's son had come to the police station only hours before and reported that he had discovered in his father's residence a small, hand-held video camera containing a recording dated October 17, 2000, that depicted his father engaging in sexual activity with a boy Whalen's son thought to be about fourteen years old.

Between four and four-thirty that afternoon, four officers took the warrant to Whalen's residence to execute it. Two of the officers, the detective who had prepared the application and his immediate supervisor, carried out the search, while the two others watched Whalen and his wife. The two searching officers testified at the suppression hearing, and while it is not clear from their testimony or otherwise clear from the record whether the affidavit was attached to the warrant, it is clear that both were familiar with the affidavit prior to the search. Both testified that they were in search of tapes and equipment that might be those Whalen's son had reported, and not, for example, ordinary commercial videos.

As soon as the detective had read the warrant to him, Whalen led the detective to a footlocker in his basement where he kept various sex-related items. In the locker the detective saw, among other things, video tapes with labels and magazines with covers suggesting child pornography. The locker also contained a few *Playboy* magazines and other adult sexual materials. It was soon clear that the locker did not contain a video camera, so rather than make a detailed inspection of the footlocker's contents, the officers resumed their primary search. In response to Whalen's inquiry, one of the officers told him that they intended to look everyplace the camera might be. Thereupon Whalen produced the camera, which still contained the tape his son had viewed. After the officers had watched a portion of the tape, they seized it, the camera, and the footlocker with its contents, some 150 items. Whalen contends that the warrant did not adequately specify the video tape or type of video tape for which the officers could lawfully search. And he complains that the seizure of the footlocker with its many non-video-tape items "flagrantly" exceeded the warrant's scope. Although we disagree with both contentions, we need not address them in detail, because even if the warrant and search be deemed to come degree flawed, the flaws are not such as would call for the blanket suppression Whalen seeks.

Whalen is correct, of course, that both the federal Fourth Amendment and Section 10 of the Kentucky Constitution prohibit general warrants, warrants which, in effect, allow the government to rummage at large through one's belongings on the chance that something incriminating will turn up.[2] The constitutional provisions are intended to make such warrants impossible by requiring that no warrant shall issue except upon probable cause and that all warrants shall "particularly describ[e] the place to be searched, and the persons or things

[2] Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 60 L. Ed. 2d 920, 99 S. Ct. 2319 (1979); United States v. Ford, 184 F.3d 566 (6th Cir. 1999).

to be seized."[3] The relationship between the particularity requirement and the probable-cause requirement is worth noting. A finding of probable cause, of course, requires that there be particular facts suggesting a reasonable probability of a particular crime. A search warrant issued on the basis of such probable cause need only limit the object of the search to things genuinely related to those facts and probative of that crime.[4]

Whalen is also correct in noting that when the relationship between warrant and probable cause beaks down, suppression of the evidence is often the remedy. When the breakdown is severe, when the warrant on its face purports to authorize a search far in excess of that justified by probable cause, or when the executing officers flagrantly disregard the warrant's limitations, in effect converting the warrant to a general one, then a blanket suppression of the evidence may called for.[5] The general rule, however, is that "the remedy for an overbroad warrant [or an overbroad search] is to sever the overbroad portions of the warrant from those portions that are sufficiently particular.[6]

This is exactly the remedy the trial court provided. It found, and we agree, that the warrant validly authorized the officers to search for the tape and the camera Whalen's son reported. It is arguable, perhaps, that the warrant could have further specified the sort of tape or tapes they were to seek,

[3] U.S. Const. amend. IV. Marron v. United States, 275 U.S. 192, 72 L.Ed. 231, 48 S.Ct. 74 (1927). Kentucky's Constitution requires that the person or thing to be seized be described "as nearly as may be." (Ky. Const. § 10). and is to be construed as consonant with the Fourth Amendment. Crayton v. Commonwealth, Ky., 846 S.W.2d 684 (1992).

[4] United States v. Logan, 250 F.3d 350 (6th Cir. 2001).

[5] Lo-Ji Sales, Inc. v. New York, *supra*; United States v. Foster, 100 F.3d 846 (10th Cir. 1996); United States v. Decker, 956 F.2d 773 (8th Cir. 1992); Florida v. Johnson, 605 So.2d 545 (Fla. App. 1992); United States v. Cardwell, 680 F.2d 75 (9th Cir. 1982).

[6] United States v. Ford, 184 F.3d at 578. *See also* Commonwealth v. Smith, Ky. App., 898 S.W.2d 496 (1995); United States v. Greene, 250 F.3d 471 (6th Cir. 2001); United States v. Riggs, 690 F.2d 298 (1st Cir. 1982).

but it is clear, as the court also found, that both officers were aware of the facts establishing probable cause and understood the object of their search accordingly. It is also arguable, perhaps, that the seizure of the footlocker and its entire contents, particularly after the officers had found the very tape and camera they wanted, exceeded somewhat the basis for the search. Even if it did, however, it certainly did not amount to a flagrant disregard of the warrant or have the effect of converting the search to a general one. The footlocker contents after all were all in one place and could plausibly have been thought probative of the particular crime under investigation. And the search ended as soon as the officers found what they were authorized to look for. The trial court, moreover, recognized the possibility that some of the footlocker items had been inappropriately seized and assured Whalen that it would exclude any of that evidence ultimately determined to have been seized in excess of the warrant and not admissible under an exception to the warrant requirement. This is all the relief to which Whalen was entitled. We affirm, accordingly, the March 28, 2001, judgment of the Kenton Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Ed W. Tranter
Ft. Thomas, Kentucky

BRIEFS FOR APPELLEE:

Albert B. Chandler, III
Attorney General

Kent T. Young
Assistant Attorney General
Frankfort, Kentucky

APPENDIX "C"

Entered
Kenton Circuit/District Court
October 23. 2000
Mary Ann Woltenberg, Clerk
By: _____, DC

COMMONWEALTH OF KENTUCKY
COUNTY OF KENTON

APPLICATION AND AFFIDAVIT IN SUPPORT OF SEARCH WARRANT

Comes the Affiant, after first being duly sworn and cautioned and states that the information contained herein was received and made in his capacity as a Peace Officer. Affiant's name is Detective Ron Johnson, Ft. Mitchell Police Department, and Affiant believes there is on or in the premises numbered: 60 Superior Drive, Ft. Mitchell, Kentucky

more particularly described as Two story, single family brown brick and brown wood siding, cream color trim residence. The word "sixty" is in black lettering over the front entry way. There is an attached brick garage. The residence is located on the north side of Superior at the intersection of Dartmouth and Superior.

the following property:
Video tapes and video recording equipment.
N/A

which property affiant believes to be:
( ) stolen

(X) things used as the means of committing a crime

(X) things in possession of a person who has intention to use means of committing a crime or in the possession of another to whom any person may have delivered it for purpose of concealing it or preventing its being discovered.

(X) things which consist of evidence which tends to show that a crime has been committed or that a particular person has committed a crime.

(X) contraband

Affiant states that on October 20, 2000, Christopher Whalen told the Affiant that while in the residence of his father John Whalen, located at 60 Superior Drive in Ft. Mitchell, Kenton County, Kentucky, he viewed a video tape that showed John Whalen and a minor sitting together on a couch in the above described residence. Christopher Whalen further told Detective R. Johnson that both John Whalen and the male white minor were nude sitting on the couch and masturbating each other. The minor appeared to be approximately 14 years old and the date on the video was October 17, 2000.

Based upon all of the above, the Affiant requests that the warrant be issued to search the described residence, located at 60 Superior Drive, in Ft. Mitchell, Kenton County, Kentucky, in order to further the Affiant's continuing investigation.

S/_____
Detective Ron Johnson, Affiant

Subscribed and sworn to before me this 20 day of Oct, 2000, at 3:05 p.m.

S/_____
Judge, Kenton Dist. Court

Entered
Kenton Circuit/District Court
October 23. 2000
Mary Ann Woltenberg, Clerk
By _____ DC

APPENDIX "D"

Entered
Kenton Circuit/District Court
October 23. 2000
Mary Ann Woltenberg, Clerk
By: _____, DC

SEARCH WARRANT

THE COMMONWEALTH OF KENTUCKY

TO ANY POLICEMAN, SHERIFF, CONSTABLE, OR OTHER PEACE OFFICER OF THE COMMONWEALTH OF KENTUCKY:

Application, by affidavit, for a Search Warrant having been made this date, and it appearing that probable cause has been stated by the affiant, Detective Ron Johnson, of the Ft. Mitchell Police Department. **You are therefore commanded to search on or in the premises:**
60 Superior Drive, Ft. Mitchell, Kentucky

more particularly described as Two story, single family brown brick and brown wood siding, cream color trim residence. The word "sixty" is in black lettering over the front entry way. There is an attached brick garage. The residence is located on the north side of Superior at the intersection of Dartmouth and Superior.

for the following property:
Video tapes and video recording equipment.
N/A

and to safely hold any thereof you may find until further Order of a Court of Competent Jurisdiction, said property constituting evidence of an offense against the peace and dignity of the COMMONWEALTH OF KENTUCKY.

Witness my hand this 20 day of Oct., 2000.

S/_____
Judge, Kenton Dist Court
Division 4th .

Executed this warrant this 20th day of Oct.,
2000, at 4:17 p m. by

S/ Det. R. Johnson .

Entered
Kenton Circuit/District Court
October 23. 2000
Mary Ann Woltenberg, Clerk
By: _____, DC

ITEMS SEIZED

	ITEM	LOCATION
1.	Sony Digital Handycam with video inside	end table in living room - 1st floor
2.	Blackfoot locker containing several videotapes & assorted sexual device & sexually oriented material	Behind Bar in Basement
3.	2 VHS video tapes marked with DGT's initials	Located on top of bookcase behind bar in basement
4.	Key to footlocker	Voluntarily provided by John Whalen.
5.	_____	_____
6.	_____	_____
7.	_____	_____
8.	_____	_____
9.	_____	_____
10.	_____	_____
11.	_____	_____
12.	_____	_____

APPENDIX "E"

13-00-007336

Evidence #E00-166

#1 Sony Handycam containing a video of suspect and young male white in the act of masturbation

Inventory of #2 and #3

1. Spice exposed tape
2. Private moments tape
3. You are not alone tape
4. Generic box with note "Girls of the "B" movies
5. Generic box with note "Swedish erotica/Big bad and beautiful
6. Generic box with note "you are not alone"
7. Book - "What you always wanted to know about the teenage sexual undergroung"
8. The bigger the better tape
9. Generic tape marked XXXX Strange behavior
10. Booklet - Pornography in color
11. Polavision phototape cassette in box
12. Generic audio cassette
13. Generic audio cassette
14. Generic audio cassette marked 02/28/00 "phone sex with Brittney"
15. Generic audio cassette marked 02/17/00 "Carrie"
16. 8mm movie reel marked #5 Clits and dicks head
17. Generic audio tape marked Adam and the ants prince charming
18. 8mm movie reel
19. Generic video marked 8mm to video 1…mechanic etc…
20. Book - Joys of masturbation
21. Book - How to win over impotence frigidity
22. Booklet - The Kent Clinic Potency Program
23. Booklet - Penthouse Variations

24. Book - How to regain your virginity
25. Envelope addressed to "John R. Whalen with several copies of Arcade magazine and other sexually oriented material
26. Teen magazine
27. Jock scene magazine
28. Hot and Hung magazine
29. Lusty Boy magazine
30. Wonder Boys magazine
31. Ball Boys magazine
32. Horny Teen magazine
33. Fresh Cock magazine
34. New Cummers magazine
35. Teen cocks magazine
36. Sweet Meat magazine
37. Envelope w/several copies of Arcade magazine
38. 8mm reel marked #3 The Devil In Her
39. 8mm reel
40. 8mm reel marked Claudine and Annie
41. 8mm reel marked Hippy 2-2A
42. 8mm reel
43. Video - Cumming of age
44. Video insider Video clip previews Vol2
45. Joys of masturbating video
46. Swedish erotica video
47. Video - "Graduation"
48. Video - "All American Boys"
49. Video - "Interviews"
50. "Euro Flash" - Box only
51. Generic video with tag marked 28 min tape SP
52. Electric vibrator
53. Tube Joy jelly flavored lubricant
54. Bottle of baby oil
55. Leather case w/cocaine spoon/straw/razor blade/glass
56. Generic cassette tape

57. Generic cassette tape marked 4-11-00 JosZins (psychologist) 513-281-1138
58. Generic cassette tape marked party thur 3/9/00
59. Generic cassette tape marked Nick mamaw 10pm 2-20-00…
60. Generic cassette tape …several misc. labels
61. Generic cassette tape marked 2-12-00 Sara Bo coats (erin)

Kroger paper bag containing the following magazines:

62. Boys for Sale
63. Like Young Male Nudist Review
64. Manner Klimaks
65. Young Athletes
66. Young Champ
67. Young Chaps
68. Bachelor Boys
69. The Boys Next Door
70. Wild in the Woods
71. Team Boys No.1.
72. Young Naked Champs
73. Australian Golden Boys
74. Australian Golden Boys
75. Wild Boys
76. Male Tales
77. Mel Roberts Boys
78. Boyfriends
79. Mel Roberts Boys
80. Hot Studs
81. How to Photograph Boys
82. Teen Baskets
83. Gay Boy Magazine
84. Slick Cocks - End of Kroger bag contents
85. Generic video cassette marked "Stripped copy"
86. Video "After Dark"
87. Video "Doing It"
88. Video "A Summer Fantasy"

89. The Rob Lowe Tape - Video
90. Amateur Nude Strippers video
91. "Collection" Vo. 1 video
92. Amateur Nude Strippers 3 video
93. Generic video marked "Big Bad and Beautiful"
94. Generic video - no markings
95. Floridas Best Kept Secrets Golden Hills video remarked Vivid Video "Talk Dirty"
96. Amateur Nude Strippers 2 video
97. Generic video marked Club Head 1:161/2 S Original Tape
98. 8mm reel marked The actor - Heads
99. 8MM reel marked TE-7- Head tag inside marked "The Boy"
100 Teenage Nudist magazine
101 8mm reel marked TR-7- Head Tag inside "Kenney TR-7"
102 Boy marked Male J/O #2 copy on tape
103 Nudism today magazine
104 8mm reel box marked R8CXM09 100ft m J/O SBH
105 Campus Jaybird magazine
106 Nudism Today magazine
107 8mm reel box marked S8CXMFF
108 Little Nudist magazine
109 8mm reel mkd SE339 S.Mast.Head
110 Little Nudist Magazine
111 New Frontier Magazine
112 Sun Lore Magazine
113 Playboy March 1991
114 Nudist Youth Magazine
115 United States Postal Service Express Mail Envelope w/5 photos of erect penis
116 Teenage Sex magazine
117 American Sunbather Magazine
118 Playboy May 1999
119 Cheri Magazine

120 Playboy November 1997
121 Teenage Nudist magazine
122 Playboy March 1964
123 Teenagers magazine
124 Teenage Jaybird magazine
125 The Fuck Shop magazine
126 Teenagers magazine
127 Teenagers magazine
128 "missed number"
129 Trick N Treat magazine
130 Gayzette magazine
131 High School Fantasies magazine
132 Springtime Youth magazine
133 Boys from BMZ magazine
134 BOYS BOYS BOYS magazine
135 Dom's Boys magazine
136 Best of More magazine
137 OBC Boys No1 magazine
138 Teenage masturbation magazine
139 After school Sex magazine
140 Skating Board Heros magazine
141 Playboy March 1983
142 The Nude Stars magazine
143 Naked Teens in Action magazine
144 Collectors Choice Magazine
145 200 Boys Magazine
146 Young and Ready magazine
147 Playboy November 1963
148 Playboy December 1963
150 The Teenage Boy magazine
151 Where the Boys Are magazine
152 Playgirl July 1998
153 Encyclopedia of Love and Sex
154 6 Polaroid photos - 1 thru 6
155 Swedish Erotica 8mm reel
156 Swedish Erotica 8mm reel

157 Audio tape generic marked Sun 5- -00, Mike and Sara prom last night
158 Audio tape generic marked Billy Idol 'Rebel Yell"
159 3 condoms

#4 Key to footlocker - Item #2

Supreme Court, U.S.
FILED
OCT 27 2003
OFFICE OF THE CLERK

No. 03-226

IN THE
Supreme Court of the United States

JOHN R. WHALEN,
Petitioner

versus

COMMONWEALTH OF KENTUCKY,
Respondent

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ALBERT B. CHANDLER III
Attorney General of Kentucky

KENT T. YOUNG
Assistant Attorney General
Counsel of Record
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204
(502) 696-5342

BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE DESCRIPTION IN THE SEARCH WARRANT OF THE THINGS TO BE SEIZED MET THE PARTICULARITY REQUIREMENT OF THE UNITED STATES CONSTITUTION.

II. WHETHER THE CONSTITUTION REQUIRES SUPPRESSION OF THE VERY ITEMS SPECIFICALLY DESCRIBED IN THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT.

III. WHETHER CERTIORARI REVIEW IS WARRANTED WITH RESPECT TO WHALEN'S "SEVERANCE" ARGUMENT.

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW

The parties to the proceeding in the Court whose judgment is under review are (1) John R. Whalen and (2) the Commonwealth of Kentucky.

TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 3

REASONS FOR DENYING WRIT 14

I. THE DESCRIPTION IN THE SEARCH WARRANT OF THE THINGS TO BE SEIZED MET THE PARTICULARITY REQUIREMENT OF THE UNITED STATES CONSTITUTION 14

II. THE CONSTITUTION DOES NOT REQUIRE SUPPRESSION OF THE VERY ITEMS SPECIFICALLY DESCRIBED IN THE

AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT. 25

III. **WHALEN'S "SEVERANCE" ARGUMENT DOES NOT WARRANT CERTIORARI REVIEW.** 31

CONCLUSION 34

TABLE OF AUTHORITIES

CASES CITED: PAGE

Andresen v. Maryland,
427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed 2d 627 (1976) 20

Florida v. Johnson,
605 So.2d 545 (Fla. 1992) 26

Horton v. California,
496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed 2d 112 (1990) .. 23

Horton v. California,
496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed 2d 112 (1990) .. 28

Lo-Ji Sales, Inc. v. New York,
442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979) 25

Maryland v. Garrison,
480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed 2d 72 (1987) .. 15

Maryland v. Garrison,
480 U.S. 79, 87-88, 107 S.Ct. 1013, 94 L.Ed 2d 72 (1987) 32

Massachusetts v. Shepphard,
468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed2d 737 (1984) 24

Stanford v. Texas,
379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965) 14

United States v. Calandra,
414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) . 33

United States v. Chadwick,
433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) 15

United States v Leon,
468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed 2d 677 (1984) . . . 25

United States v. Leon,
468 U.S. 897, 918, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) 33

United States v. Ross,
456 U.S. 798, 820-821, 102 S.Ct. 2157, 72 L.Ed 2d 572
(1982) 22

United States v. Ross,
456 U.S. 798, 820-821, 102 S.Ct. 2157, 72 L.Ed 2d 572
(1982) 27

STATE STATUTES CITED:

K.R.S. 531.310 4

FEDERAL STATUTES CITED:

28 U.S.C. §1257(a) 2

UNITED STATES CONSTITUTION CITED:

Fourth Amendment to the United States Constitution 3

No. 03-226

IN THE
Supreme Court of the United States

JOHN R. WHALEN,

Petitioner

versus

COMMONWEALTH OF KENTUCKY,

Respondent

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Commonwealth of Kentucky, by counsel, pursuant to Order of this Court, submits this brief in opposition to the petition for a writ of certiorari.

OPINIONS BELOW

The Opinion of the Kentucky Court of Appeals and the Order of the Kentucky Supreme Court denying discretionary review are referenced at page 2 of the certiorari petition and are reproduced as Appendices A and B to the certiorari petition. The Kenton Circuit Court's written ruling on Whalen's suppression motion is reproduced in part at page 6 of the certiorari petition.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(a). The petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The petitioner asserts the Fourth Amendment to the United States Constitution as the constitutional provision involved. That Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

COUNTERSTATEMENT OF THE CASE

On December 15, 2000, a Kenton Circuit Court Grand Jury returned an indictment against the petitioner, John Whalen, charging him as follows:

> That prior to October 20, 2000, in Kenton County, Kentucky, John Whalen committed the offense of USE OF A MINOR (UNDER 16 YEARS OLD) IN A SEXUAL PERFORMANCE, a felony, when the Defendant employed, consented to,

> authorized, or induced a minor to engage in a sexual performance, which is in violation of K.R.S. 531.310 and AGAINST THE PEACE AND DIGNITY OF THE COMMONWEALTH OF KENTUCKY.

(State Court Transcript of Record, hereinafter "TR," 14).

Whalen entered into a conditional guilty plea, a procedure authorized by the Kentucky Rules of Criminal Procedure. (TR 61-66; State Court Videotape Record, hereinafter "VT," 02/22/01). Pursuant to that plea, Whalen was adjudged guilty on one count of use of a minor (under 16 years of age) in a sexual performance. He was sentenced to a 12-year term of imprisonment. (TR 71-73).

Whalen's plea was conditioned on the Kenton Circuit Court's ruling on Whalen's motion to suppress evidence obtained in a search, pursuant to a search warrant, of Whalen's residence. (The Kenton Circuit Court's Order ruling on Whalen's suppression motion is contained in the

state court record at TR 52-53). The Kenton Circuit Court overruled the motion to suppress with respect to videos and a video camera seized from the Whalen residence. The Kenton Circuit Court entered its ruling after having had the benefit of an evidentiary hearing, oral arguments of counsel and written argument. (VT, 01/29/01, 02/12/01; TR 16-43, 49-51).

Whalen's motion to suppress focused on the language on the face of the search warrant which described the property to be seized. (TR 22-30). The property to be seized was described on the face of the search warrant as "[v]ideo tapes and video recording equipment." (TR 31; Appendix D to certiorari petition). The affidavit in support of the search warrant also described the property to be seized as video tapes and video recording equipment, but provided additional details:

> Affiant states that on October 20, 2000, Christopher Whalen told the Affiant that while in the residence of his father John Whalen, located at 60 Superior Drive in Ft. Mitchell, Kenton County, Kentucky, he viewed a video tape that showed John Whalen and a minor sitting together on a couch in the above described residence. Christopher Whalen further told Detective R. Johnson that both John Whalen and the male white minor were nude sitting on the couch and masturbating each other. The minor appeared to be approximately 14 years old and the date on the video was October 17, 2000.

(TR 32; Appendix C to certiorari petition).

Detective Ron Johnson of the Ft. Mitchell Police Department was the affiant on the affidavit in support of the search warrant. (TR 32-33; Appendix C to certiorari petition). Det. Johnson is the individual who applied for the search warrant. (VT, 01/29/01, 04:20:25). Det. Johnson was the detective in charge of the investigation. (VT, 01/29/01, 04:27:40).

The affidavit in support of the search warrant was prepared prior to seeking a warrant from the judge who issued the search warrant in this case. (VT, 01/29/01, 04:25:32). The search warrant, itself, was drawn up by the Commonwealth's Attorney's Office prior to application to the judge for the warrant. (VT, 01/29/01, 04:25:40, 04:26:28).

Police reports pertaining to the search warrant were attached as exhibits to Whalen's memorandum in support of his motion to suppress. (TR 41-43). Those police reports were entered by stipulation as evidence at the suppression hearing. (VT, 01/29/01, 05:05:18-05:06:06). Copies of the reports of Det. Johnson and Sgt. Tom Loos are included as an Appendix hereto, and are incorporated by reference.

In October of 2000, Chris Whalen, the son of John Whalen, came to Det. Ron Johnson's office, and provided the

information which Det. Johnson included in the affidavit in support of the search warrant. (VT, 01/29/01, 04:20:55-04:22:10, 04:23:34, 05:02:52, 05:03:07, 05:03:34; TR 42). Det. Johnson applied for the search warrant on October 20, 2000, and the search warrant was executed on October 20, 2000. (VT, 01/29/01, 04:22:25, 05:06:14; Appendix hereto).

Four officers participated in the execution of the search warrant: Det. Johnson, Sgt. Loos, Specialist Taylor, and Sgt. Bussman. Det. Johnson and Sgt. Loos testified at the evidentiary hearing on Whalen's motion to suppress. The roles of Specialist Taylor and Sgt. Bussman, who did not testify at the evidentiary hearing, were limited in the execution of the search warrant. Specialist Taylor stayed upstairs with Mrs. Whalen during the search. Sgt. Bussman's job was to shadow Mr. Whalen during the search. (VT, 01/29/01, 04:45:04, 04:45:25, 04:47:02).

When the police got to the Whalen residence on October 20, 2000 and read the search warrant to Whalen, Whalen said he knew what the police were looking for. Whalen took Det. Johnson straight to a footlocker in the basement of the Whalen home. (VT, 01/29/01, 04:33:45; TR 41; Appendix hereto).

Whalen wanted to know if the police had to go through the footlocker at the residence while Whalen's wife was present at the residence. (VT, 01/29/01, 05:00:23, 05:00:56-05:01:07). Det. Johnson said he did. (VT, 01/29/01, 05:01:08).

Whalen gave Det. Johnson a key to open the footlocker. Whalen also advised Det. Johnson that it was necessary to use a knife in conjunction with the key to open the footlocker. (VT, 01/29/01, 04:58:07). When Det. Johnson opened the footlocker, he immediately saw

magazines which appeared to have minors on the cover and had titles implying the minors engaged in sexual acts. (VT, 01/29/01, 04:32:09-04:32:28). The footlocker contained videotapes and magazines. In all, 159 items were contained in the footlocker. The items were inventoried in a list. (TR 34; VT, 01/29/01, 04:31:25, 04:32:48; Appendix E to certiorari petition). Because of the sheer number of items contained in the footlocker and the fact that there was no way for the police to ascertain what each of those items contained without viewing the items, a decision was made to seize the contents of the footlocker rather than view each of the items separately there at the Whalen residence. (VT, 01/29/01, 04:30:03, 04:32:33-04:32:47, 04:59:03).

The information the police had obtained from Chris Whalen was that the tape for which they specifically were looking, the videotape of Whalen and the unknown boy, was

in a camera. The police did a cursory look through the footlocker for a camera but found none. ((VT, 01/29/01, 04:38:65-04:38:26). The search for the camera continued at the Whalen residence, to determine if there was a tape still in the camera. (VT, 01/29/01, 04:38:34).

Det. Johnson asked Whalen if there was a small hand-held video camera in the residence. (VT, 01/29/01, 04:40:11-04:40:27). Sgt. Loos also asked Whalen about the camera and tape. (VT, 01/29/01, 04:40:45).

Whalen asked Sgt. Loos why the camera was important. Sgt Loos informed Whalen the camera and videotape in the camera were named in the search warrant. At the evidentiary hearing on Whalen's motion to suppress, Sgt. Loos explained that he still believes that those items were named in the search warrant. It was his belief that the search warrant instructed the officers to look for the camera,

the tape it contained and other videotapes. (VT, 01/29/01, 05:15:29-05:17:10, 05:17:56).

Whalen asked Sgt. Loos what Sgt. Loos believed the videotape would show. Sgt. Loos explained he believed the videotape would show Whalen and a teenager masturbating. (VT, 01/29/01, 05:17:47, 05:17:58).

Whalen then asked if the fact that the teenager consented would make a difference. Sgt. Loos responded that there were several factors to be considered. Sgt. Loos explained at the evidentiary hearing that two factors came to his mind at the time: The age of the participant and what acts were performed. Sgt. Loos further explained that he was aware at the time the search warrant was executed of the affidavit in support of the search warrant which stated that Chris Whalen had seen a video of John Whalen and a person unknown to Chris Whalen, a person who appeared to be a

minor, masturbating. Sgt. Loos explained at the hearing he was aware that Chris Whalen had given this information to Det. Johnson, and that Det. Johnson had signed the affidavit. (VT, 01/29/01, 05:18:48-05:21:13).

Whalen asked the officers how long the officers were going to search. The officers responded that they were going to search everywhere that the camera could possibly be located. At that point, Whalen turned over the camera. (VT, 01/29/01, 05:26:00-05:26:21).

REASONS FOR DENYING WRIT

I.

THE DESCRIPTION IN THE SEARCH WARRANT OF THE THINGS TO BE SEIZED MET THE PARTICULARITY REQUIREMENT OF THE UNITED STATES CONSTITUTION.

Whalen argues the search warrant at issue in the case at bar did not meet the particularity requirement of the Fourth Amendment to the United States Constitution. He contends the warrant failed to describe with particularity the things to be seized.

It is important to note at the outset what the language employed in the warrant which issued in the case at bar was not designed to do. Whalen's citation to Stanford v. Texas, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965) notwithstanding, in Whalen's case the description in the warrant of the things to be seized was not designed to authorize seizure of things based

on the *ideas* contained in those things. The language employed in the search warrant in the case at bar was designed to authorize seizure of video evidence of Whalen engaging in sex acts with a minor.

Constitutional warrant requirements are designed to provide protection from *unreasonable* searches and seizures. As the Court stated in United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977):

> Our fundamental inquiry in considering Fourth Amendment issues is whether or not a search or seizure is reasonable under all the circumstances.

Id., 433 U.S. at 9 (internal footnotes and cases cited in footnotes omitted).

The particularity requirement of the Fourth Amendment is designed to prohibit exploratory general searches. Maryland v. Garrison, 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed 2d 72 (1987). The search warrant in Whalen's case did not leave to

the unfettered discretion of the executing officers the question of what type of item or items to seize at Whalen's residence. It did not purport to authorize an exploratory general search.

The property to be seized was described on the face of the search warrant as "[v]ideo tapes and video recording equipment." (Appendix D to certiorari petition). The search warrant specifically recited that it was based upon application for the search warrant having been made "by affidavit." (Id.). The affidavit in support of the search warrant also described the property to be seized as video tapes and video recording equipment, but provided additional details:

> Affiant states that on October 20, 2000, Christopher Whalen told the Affiant that while in the residence of his father John Whalen, located at 60 Superior Drive in Ft. Mitchell, Kenton County, Kentucky, he viewed a video tape that showed John Whalen and a minor sitting together on a couch in the above described residence. Christopher Whalen further told Detective R. Johnson that both

> John Whalen and the male white minor were nude sitting on the couch and masturbating each other. The minor appeared to be approximately 14 years old and the date on the video was October 17, 2000.

(Appendix C to certiorari petition).

The affiant to the affidavit in support of the search warrant, Det. Ron Johnson of the Fort Mitchell Police Department, was the detective in charge of the investigation in Whalen's case. (VT, 01/29/01, 04:27:40; Appendix C to certiorari petition). Detective Johnson was one of four officers participating in the execution of the search warrant at Whalen's residence. The roles of two of the officers participating in the execution of the search warrant, Taylor and Bussman, were limited to keeping an eye on Mr. and Mrs. Whalen during the execution of the search warrant. (VT 01/29/01, 04:45:04, 04:45:25, 04:45:25, 04:47:02). Hence, the only two officers

actively engaged in the search of the Whalen residence were Det. Johnson and Sgt. Loos.

Since Det. Johnson was in fact the affiant to the affidavit in support of the search warrant, he was aware of the nature of the videotape or videotapes being sought in the search, as well as the fact that a video tape might still be in a video camera at Whalen's residence. (See Appendix C to certiorari petition; Appendix B[1] hereto). The record also establishes that Sgt. Loos was aware of the nature of the video tape or video tapes for which he was searching at the Whalen's residence, as well as the fact that the videotape might be contained in a video camera

---

[1]The police reports contained in the appendix to this brief in opposition were originally attached as exhibits to Whalen's memorandum in the state court in support of his motion to suppress. (TR 41-43). Those police reports were entered by stipulation as evidence at the state court suppression hearing. (VT, 01/29/01, 05:05:18 - 05:06:06).

at Whalen's residence. (VT 01/29/01, 05:17:47, 05:17:58; Appendix C hereto).

Sgt. Loos testified at the state court suppression hearing concerning what he believed the video tape or video tapes he was searching for would show: Whalen and a teenager masturbating together. (VT, 01/29/01, 05:17:47, 05:17:58). Sgt. Loos, like Det. Johnson, was looking for a video tape or video tapes consistent with the conduct described in the affidavit in support of the search warrant. (See Appendix C to certiorari petition and Appendix B to this brief in opposition). The search warrant in the case at bar was in fact designed to authorize seizure of video documentation of Whalen engaging in sex acts with a minor.

The sufficiency of the description in the search warrant of the property to be seized is to be viewed in light of the information known to the police officers and the issuing court

at the time search warrant issued. Maryland v. Garrison, *supra*, 480 U.S. at 85-86. If additional facts are later discovered in executing a search warrant which with benefit of hindsight render the description of the property to be seized arguably broader than appropriate, the question then becomes one of the reasonableness of the manner of execution rather than one of whether the warrant described the property to be seized with sufficient particularity to pass constitutional muster. Maryland v. Garrison, *supra*.

Moreover, the fact that the warrant for a search of Whalen's residence referred to videotapes in the plural did not convert the search warrant into an exploratory general warrant. In Andresen v. Maryland, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed 2d 627 (1976), for example, the Court found that a search warrant did not violate the constitutional prohibition against general search warrants where the warrant authorized

seizure of "other fruits, instrumentalities and evidence of [the] crime [of false pretenses] at (this) time unknown." *Id.*, 427 U.S. at 479, 480-481.

Ironically, in the case at bar Whalen seeks to force suppression of the specific videotape which was described in the affidavit in support of the search warrant. In his certiorari petition Whalen seeks, as he did in the state court, to exploit the consequences of his actions when the executing officers arrived at his residence to execute the search warrant. When the police got to the Whalen residence and read the search warrant to Whalen, Whalen said that he knew what the police were looking for and took them straight to a footlocker in the basement of the Whalen home. (VT, 01/29/01, 04:33:45; certiorari petition at pages 3-4). When Det. Johnson opened that footlocker, Det. Johnson immediately saw magazines which appeared to have minors on the cover, and which had

titles implying that minors were engaging in sexual acts. (VT, 01/29/01, 04:32:09 - 04:32:28). The salient point for the purpose of deciding whether the search warrant, itself, described the items to be seized with sufficient particularity is this: Whether seizure of items contained in the trunk was or was not expressly authorized by the language of the search warrant, the limited initial *search* of the footlocker was within the scope of the place to be searched. The police opened the footlocker to begin with because that is where Whalen took them in response to having been read the search warrant.

"A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or open maybe required to complete the search." United States v. Ross, 456 U.S. 798, 820-821, 102 S.Ct. 2157, 72 L.Ed 2d 572 (1982). "[N]ice distinctions between closets, drawers, and

containers, in the case of a home, or between upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand." *Id.*, 456 U.S. at 821.

In addition, if evidence of crime is in plain view, police officers may seize that evidence without a warrant regardless of whether the discovery of that evidence was inadvertent. Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed 2d 112 (1990). The potential evidentiary value of the items in Whalen's footlocker is addressed in argument II herein, but it is worth noting at this point that whether the officers ultimately were or were not correct in their assessment of the evidentiary potential of the items in the footlocker, an objectively reasonable mistake in the execution of the search warrant does not require suppression of the valid fruits of the search. Maryland v. Garrison, *supra*, 480 U.S. at 87-88. A cursory

review of Appendix E to the certiorari petition, which contains titles for the 159 items found in the footlocker, will readily reveal why police officers thought the footlocker contained evidence of crime.

In assessing whether the description of the items to be seized was set forth with sufficient particularity in the search warrant, it matters not, as Whalen contends, that the language might have been drafted with even greater precision in light of matters which came to light in executing the search warrant. Maryland v. Garrison, *supra*. The search warrant was valid when issued. *Id.* Alternatively, assuming for the sake of argument only that the description in the search warrant of the things to be seized was overly broad, the executing officers' good faith reliance on that warrant precludes suppression as a remedy in Whalen's case. Massachusetts v. Shepphard, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed2d 737 (1984); *see also*,

United States v Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed 2d 677 (1984).

Certiorari review is not warranted.

II.

THE CONSTITUTION DOES NOT REQUIRE SUPPRESSION OF THE VERY ITEMS SPECIFICALLY DESCRIBED IN THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT.

Arguments I and III herein are incorporated by reference.

Unlike Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979), in which police were given carte blanche authority to seize items the executing officers in their judgment felt to be obscene, the search warrant in the case at bar did not issue to authorize seizure of things based on the *ideas* contained in those things. The language employed in the search warrant in the case at bar was designed to authorize

seizure of video evidence of Whalen engaging in sex acts with a minor.

As for Florida v. Johnson, 605 So.2d 545 (Fla. 1992), whatever the merits of that case holding may be, the case at bar simply is not a case where the executing officers flagrantly disregarded the terms of the warrant. In the case at bar, when the police got to the Whalen residence and read the search warrant to Whalen, Whalen said that he knew what the police were looking for and took them straight to a footlocker in the basement of the Whalen home. (VT, 01/29/01, 04:33:45; certiorari petition at pages 3-4). When Det. Johnson opened that footlocker, Det. Johnson immediately saw magazines which appeared to have minors on the cover, and which had titles implying that minors were engaging in sexual acts. (VT, 01/29/01, 04:32:09 - 04:32:28). The executing officers in the

case at bar did not arbitrarily take it upon themselves to go searching for items beyond the scope of the warrant.

Whether seizure of items contained in the trunk was or was not expressly authorized by the language of the search warrant in the case at bar, the limited initial *search* of the footlocker was within the scope of the place to be searched. The police opened the footlocker to begin with because that is where Whalen took them in response to having been read the search warrant. "A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or open maybe required to complete the search." United States v. Ross, 456 U.S. 798, 820-821, 102 S.Ct. 2157, 72 L.Ed 2d 572 (1982). "[N]ice distinctions between closets, drawers, and containers, in the case of a home, or between upholstered seats, trunks, and wrapped packages, in the case of a vehicle,

must give way to the interest in the prompt and efficient completion of the task at hand." *Id.*, 456 U.S. at 821.

In addition, if evidence of crime is in plain view, police officers may seize that evidence without a warrant regardless of whether the discovery of that evidence was inadvertent. Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed 2d 112 (1990). Whether the executing officers in the case at bar ultimately were or were not correct in their assessment of the evidentiary potential of the items in the footlocker, an objectively reasonable mistake in the execution of the search warrant does not require suppression of the valid fruits of the search. Maryland v. Garrison, *supra*, 480 U.S. at 87-88. A cursory review of Appendix E to the certiorari petition, which contains titles for the 159 items found in the footlocker, will readily reveal why police officers thought the footlocker contained evidence of crimes involving minors. Moreover, a

review of the titles of items seized from the footlocker reveals that more than a few appear to evidence a prurient interest in nude minors and sexual acts by minors, and hence might appear to have potential evidentiary value with respect to the sexual acts with a minor captured on the video tape described in the affidavit in support of the search warrant.

As for the items actually seized in the execution of the search warrant at the Whalen house, the Commonwealth advised the defense and the state trial court that the Commonwealth had no intention of introducing during its case-in-chief any of the items contained in the footlocker seized at the Whalen residence. (VT, 01/29/01, 12:10:14-12:13:26). The practical effect of the state trial court's subsequent ruling on Whalen's suppression motion was that the only items seized at the Whalen residence which were expressly not suppressed were the video tape described in the affidavit in support of the

search warrant -- and the camera, also referenced in the affidavit in support of the search warrant, in which that video tape was found.

The Commonwealth did advise the state trial court and the defense that it could not guarantee the Commonwealth might not wish to introduce some of the items from the footlocker in rebuttal at trial, depending on what the testimony the defense might produce at trial. (VT, 01/29/01, 12:10:14-12:13:26). The state trial court therefore ruled as follows a with respect to the items from the footlocker:

> FURTHER, the defendant's motion to suppress, as it relates to all other items seized, is TAKEN UNDER SUBMISSION. If the Commonwealth seeks to admit any of these items in evidence, it shall promptly notify counsel for the defendant, and this issue will be reconsidered by the court upon request of the defendant.

(TR 52-53; certiorari petition, p. 6).

Rather than insist on a final ruling on his suppression motion with regard to items from the footlocker, Whalen entered into a conditional guilty plea. (TR 61-66; State Court Videotape Record, hereinafter "VT," 02/22/01).

Certiorari review is not warranted.

III.

WHALEN'S "SEVERANCE" ARGUMENT DOES NOT WARRANT CERTIORARI REVIEW.

Arguments I and II herein are incorporated by reference.

The state trial court ruled as follows a with respect to the items from the footlocker:

> FURTHER, the defendant's motion to suppress, as it relates to all other items seized, is TAKEN UNDER SUBMISSION. If the Commonwealth seeks to admit any of these items in evidence, it shall promptly notify counsel for the defendant, and this issue will be reconsidered by the court upon request of the defendant.

(TR 52-53; certiorari petition, p. 6).

Rather than insist on a final ruling on his suppression motion with regard to items from the footlocker, Whalen entered into a conditional guilty plea. (TR 61-66; State Court Videotape Record, hereinafter "VT," 02/22/01).

An objectively reasonable mistake in the execution of a search warrant does not require suppression of the valid fruits of the search. Maryland v. Garrison, 480 U.S. 79, 87-88, 107 S.Ct. 1013, 94 L.Ed 2d 72 (1987); The seized video tape which was expressly not suppressed in the state court was the very video tape described in the affidavit in support of the search warrant, a video tape which documented Whalen and a minor engaged in masturbation. The fact that the police also seized items in a footlocker to which Whalen led them when he was read the warrant, items which appeared to document sex acts with minors, simply does not implicate the draconian sanction of suppression of all seized evidence. Suppression "is

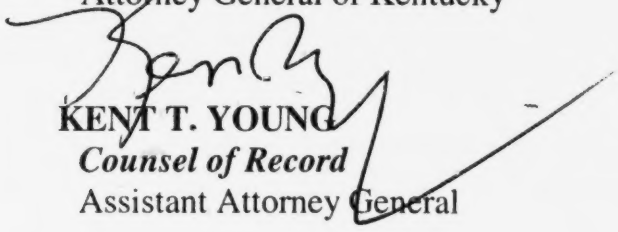
a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." United States v. Calandra, 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). "[S]uppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual circumstances in which exclusion will further the purpose of the exclusionary rule." United States v. Leon, 468 U.S. 897, 918, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

Certiorari review is not warranted.

CONCLUSION

WHEREFORE, certiorari review should be denied.

ALBERT B. CHANDLER III
Attorney General of Kentucky



KENT T. YOUNG
Counsel of Record
Assistant Attorney General

No. 03-226

IN THE
Supreme Court of the United States

JOHN R. WHALEN,
Petitioner

versus

COMMONWEALTH OF KENTUCKY,
Respondent

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALBERT B. CHANDLER III
Attorney General of Kentucky

KENT T. YOUNG
Assistant Attorney General
Counsel of Record
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204
(502) 696-5342

TABLE OF APPENDICES

A. R. Johnson police report re search warrant execution.

B. R. Johnson police report re Chris Whalen statement.

C. Sergeant Loos police report.

APPENDIX A

Fort Mitchell Police

At approxi. 4:17pm this Officer along with Sgt. Tom Loos responded to 60 Superior to execute a search warrant at the Whalen residence. This Officer knocked on the front door and was greeted by Mrs. Whalen. I asked her if Mr. Whalen was at home. She stated that he was and he then came to the door. I identified myself to Mr. Whalen and read the search warrant to him. Upon entering the residence Mr. Whalen stated that he knew what we were looking for and that he would take me to it and show me. Sgt. Bussman and Spl. Taylor joined us. Spl. Taylor walked into the dinning room with Mrs. Whalen and Sgt. Bussman and myself were led to the basement by Mr. Whalen. Sgt. Loos went to the second floor to begin a search in the bedroom. Mr. Whalen took me behind the bar where a footlocker was located. Mr. Whalen stated that he keeps adult videos he has locked in there. I asked Mr. Whalen if he had the key. Mr. Whalen asked me if I had to open it. I advised him that I did. He handed me the key to the footlocker and then stated that we

had to use knife to turn the lock after the padlock was removed. Mr. Whalen was then asked if he owned a small hand held video camera. He stated that he did but that he had loaned it out to a friend and did not want to tell us to who out of fear of getting them in trouble. I then continued my search of the basement. Sgt. Loos came to the basement and had a conversation with Mr. Whalen which resulted in Mr. Whalen taking Sgt. Loos to the location of the camera and spoke briefly to investigators about the contents of the tape. (details see Sgt. Loos report).

The search was concluded and items seized were noted on the back of the search warrant and a copy left at the residence.

Investigation continuing.

Det. R. Johnson

APPENDIX B

Fort Mitchell Police

Statement of Christopher Whalen on 10/19/2000

At Approx. 1:10pm on 10/20/2000 a subject identified as Christopher Whalen stopped in the Ft. Mitchell Police Dept. to report items that he saw in his Fathers residence that he felt were disturbing and should be reported to the Police. Chris stated that he found a small hand held camera in his Fathers bedroom dresser drawer on 10/19/2000. He stated that he looked at the contents of the tape and saw a video of his Father seated on the couch in the residence with his pants around his ankles and seated next to him was a male subject that appeared to him to be around the age of 14 to 15 yrs of age. This subject also had his pants around his ankles and his Father was masturbating the subject. Chris stated that his motivation to report this was not of vengeance and he was wrestling with the decision to report it to the Police. Chris further stated that he was so upset about the tape that he felt if it were anybody else he would report it and felt that he should do the same with this. Chris also stated that his father

keeps a footlocker locked in the basement and several years ago when he was a child he saw a video his father had of a child involved in sex and that he knew that his Father kept these type of videos in that footlocker.

Det. R. Johnson.

13-00-007336
Whalen, John

October 20, 2000
Sergeant Tom Loos

I spoke with John Whalen in a basement storage room of his home. Sgt. Bussman was in the adjacent family room during the time of our conversation. Detective Johnson was in the family room behind the bar where the footlocker was located. I sat in a chair near Mr. Whalen and attempted to answer some questions he had. He asked if he was going to be arrested. I explained that he was not under arrest nor was he going to be arrested before we left his home. I told him that he was free to come and go as he pleased and could leave any time he chose. He asked what we would do if he left and I explained that we would continue with our search and evidence collection then leave. He asked who was going to view the items in his footlocker, expressing concern of embarrassment. I asked Mr. Whalen about the 8mm video camera that he told Detective Johnson had been loaned out. He explained that he loaned it to someone last Sunday

(October 15th) and he did not want to tell us the person's name for fear of getting someone into trouble. When I explained that I had reason to believe that the camera was in the house on Thursday, (October 19th) Mr. Whalen asked why the camera was important. I explained that the camera and the video it contained were specifically named in the search warrant. He asked what I thought the camera would show and I explained that I believed the video tape contained a recording of him and a teenager masturbating each other. Mr. Whalen asked if the fact that the teenager consented would make a difference. I told him that there were several factors that had to be considered when deciding how significant the recording would be. Mr. Whalen asked how long we were going to search. I explained that we would continue to search until we looked every place that could contain the video camera. Mr. Whalen agreed to show me where the video camera was after I agreed to view a portion of the tape and discuss the significance of it with him.

Mr. Whalen left the basement and walked up the stairs into his living room. He opened the door to an end table near the front door and removed a camera. We returned to the basement. Detective Johnson and I watched a portion of the recording with Mr. Whalen. Mr. Whalen then explained that the teenager in the video was a young man that he knew from around the neighborhood named David who was a Sophomore at Covington Catholic High School. He believed David to be 15 or 16 years old. He further stated that the encounter was consensual and that it occurred on Wednesday (October 18th) afternoon. I asked for additional details and Mr. Whalen asked if he should speak with an attorney. I explained that I couldn't answer that question but explained again that he wasn't being detained and he was free to do whatever he wanted and call anyone he wanted. Mr. Whalen said that he thought he should speak to an attorney.